In the Supreme Court
OF THE
United States

Office Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1944

No. 155

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

PETITIONERS' CLOSING BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

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CCA Rule 3 is not "for the guidance and protection of the clerk". It is a provision defining the nature and extent of his authority during adjournment.

According to counsel, the clerk had a right to obey—*and he had a right to disobey.* If so, why was such a rule adopted? Why did the entire Court join in a solemn and unanimous act of signing and filing the amendment which appears at page 5 of our petition?

"**Unanimous.**"

The opinion shows on its face that it was not unanimous.

> "**We** need not stop to inquire . . . the opinion already sufficiently indicates **our view** . . . **We** find no merit in other points argued.
>
> Affirmed.
>
> William Healy,
> United States Circuit **Judges.**"

"**Informing the Clerk.**"

Counsel suggest that,

> ". . . the Court should be and was free to adopt any appropriate method of informing its ministerial officer of a decision reached." (Brobeck p. 16.)

Circuit Judge Mathews made the following statement on April 3, 1944:

> ". . . the clerk was authorized to do what he did. The opinion was unanimous. The clerk's action was in accordance with the direction of the Court . . ." (R. 2058.)

On this occasion petitioners were informed that *it was none of their business whether Rule 3 had been obeyed.* (R. 2058.)

The document evidencing amendment of that rule was signed by Judge Mathews in November, 1936. His associates were equally familiar with its terms. Deliberate error has been injected into the record.

This condition may not be accidental. Our attention has been directed to an unusual opinion, rendered by the California Supreme Court, while sitting in bank at San Francisco. See

People v. Ruef, 14 Cal. App. 576, 620-632,

where an order was held invalid for want of a sufficient number of concurring signatures. We quote from that opinion:

> ". . . *the joint action or concurrence of four justices* is the thing required to constitute the action of the court. . . . *In contemplation of law, this joint action is taken when four justices have in writing declared their concurrence* in a particular order or judgment, with intent to make it an order or judgment . . ." (14 Cal. App. 624.)

> "When Justice Henshaw left the state, no other Justice had joined with him in assenting to such order, *and the assent theretofore given by him amounted to nothing more than an indication by him to his associates of his then willingness to concur . . . Such previously indicated assent . . . is ineffectual for any purpose . . .*" (14 Cal. App. 629-630.)

See also:

Matter of Kings County Elevated R.R. Co., 78 N.Y. 383,

where the Court held invalid, an opinion containing only one signature.

> ". . . A term may be held by two or three judges, but at least two must concur in any judgment to be

rendered. A single member can decide nothing . . . *That the absent judge has previously indicated his conclusion is not enough, for he must participate or take part when the decision is actually made, to render it lawful.*" (78 N.Y. 385-386.)

Rehearing in bank was not "a matter of grace" on the facts here presented. *We were entitled to have our case considered by judges not involved in a violation of Court rules.* So far as we can determine, no one ever acted except Judges Mathews, Stephens and Healy. (R. 2061.)

DENIAL OF HEARING IN DISTRICT COURT.

The petition was not submitted. There was a conversation between the Court and counsel. It was suggested that counsel submit the case on the petition. Discussion followed. The Court decided not to act upon that suggestion. *On its own motion, it continued the petition for a further hearing.*

There is a dispute which concerns the reporter's transcript. The last page was incomplete. We covered that matter by an affidavit in the Circuit Court. This states:

> "The reporter's notes are incomplete in that there was no record made of the following conversation occurring just before the case was continued for further hearing.
>
> "*The Court stated that there was some doubt as to whether appellants' motion for a nonsuit should be granted forthwith or whether it would be advisable to continue the case for a further hearing and to then pass upon this nonsuit motion.* After some reflection, the court decided to continue the case for a further hearing. A conversation to that effect took place be-

tween the Court and counsel just before the following entries, which appear at the end of the reporter's transcript:

"'The Court. Very well, I will continue this matter until the 21st of April.

"'(The further hearing of the matter was thereupon continued until Tuesday, April 21, 1942.)'" (R. 1936.)

There are counter-affidavits by the clerk and reporter. (R. 1949, 1950.) Those witnesses could not recall the statement quoted. On that issue there is a conflict. The other facts are beyond dispute.

On March 31, 1942 the petition was continued for a further hearing. The minute order so provides:

"This case came on regularly . . . on petition of defendant Anglo California National Bank of San Francisco to terminate action . . . R. H. Holmberg and W. H. Thomson were sworn and testified on behalf of the defendant. Mr. Sargent offered in evidence and filed certain exhibits which were marked Plaintiff's Exhibits Nos. 1, 2, 3, and 4. Mr. Sargent then moved the court to deny the petition. The matter was argued by Mr. Sargent and Mr. Williams, *and the further hearing hereof continued to April 21, 1942.*" (R. 392.)

That entry is the best evidence—in fact, it is the only competent evidence of the action taken on this petition. It records what the Court decided. It discloses what the Court actually did. That entry is confirmed by other documents:

We quote from the clerk's work sheet:

"Mr. Sargent moved Court to deny Petition. Sub. on argument by Mr. Sargent & Mr. William. *Further Hrg Cont Apr 21—*". (R. 1937.)

A continuance is disclosed by the last entry in the reporter's notes:

> "(The further hearing of the matter was thereupon continued until Tuesday, April 21, 1942.)" (R. 1890.)

The petition was not continued "for convenience". It was the practice of the District Court to take matters off calendar and to keep them off calendar while under submission. That practice was invariably followed in the case at bar. Those facts are shown by affidavit. (R. 1928.)

Continuances after March 31, 1942.

On five subsequent dates, this petition was continued for a *further hearing*. An appropriate entry was made on each occasion:

April 13, 1942—Continued to May 5, 1942. (R. 398.)
May 1, 1942—Continued to May 19, 1942. (R. 399.)
May 13, 1942—Continued to June 19, 1942. (R. 402.)
June 13, 1942—Continued to July 1, 1942. (R. 429.)
June 22, 1942—Continued to August 18, 1942. (R. 438.)

These objections were on the calendar when judgment was entered. They were set for August 18, 1942. (R. 438, 476.)

Amended objections were filed May 20, 1942. (R. 403.) Counsel were served on that date. They received the following letter:

"Aaron M. Sargent
Attorney at Law
1115 Hobart Building
San Francisco, California
EXbrook 1447

May 20, 1942.

Messrs. Chickering & Gregory,
111 Sutter Street,
San Francisco, California.

Mr. Fisk:

Subject—Denicke v. Anglo California National Bank—No. 21033-S.

Dear Sirs:

You will find enclosed herewith copy of plaintiff's objections interposed in opposition to the petition of the bank for approval of compromise and for termination of the litigation, the original of which was filed with the clerk of the District Court today.

As I understand the record in this matter, according to the minute order entered Mar. 31, 1942, there is now pending a motion by plaintiff for a nonsuit with respect to the petition of the bank for termination of the litigation. In case there should be an order denying this motion for nonsuit, plaintiff is entitled to introduce evidence in support of his objections.

Under these circumstances, we desire to have a full hearing in order to introduce proof of those matters which were not within our power to establish by evidence at prior hearings. Such evidence includes particularly, proof of the actual amount of damages sustained, introduction of evidence to establish the unconditional liability of the parties affected for the losses which are set forth in plaintiff's amended objections, and proof of the liability of the directors therefor.

We contemplate making an application to the court for such relief inasmuch as we were unable to present such proof at a prior date.

Very truly yours,

AARON M. SARGENT.

AMS/EM
Enc."

(R. 1941.)

We were ready for trial. Our objections were on the calendar—*set for hearing on August 18, 1942.*

We expected the court to call that calendar and announce our case.

It was the constitutional duty of the District Court to make that announcement.

MISTAKE.

We had an absolute right to relief on the ground of mistake. An application was made under Rule 60 (b) FRCP and arbitrarily denied. (R 468, 471, 737.) This ground is specified in our petition and brief.[1] Respondents have nothing to say.

FINDINGS.

General findings are not permitted. Rule 52 requires the Court to find the facts, *specially,* in *all cases.*[2]

---

[1]Petition, p. 25, par. 6. Brief specifies this error at p. 43, par. 6; discussion at p. 57.

[2]Rule 52: "In *all actions* tried upon the facts without a jury, the court shall find the facts *specifically* and state separately its conclusions of law thereon and direct the entry of the appropriate judgment . . ."

A dispute over a compromise is *an action,* in a very real sense. It involves litigation as between the corporation and its stockholders. Where *facts* are determined it is necessary to make *findings.*

The so-called finding of "good faith" is a recital taken from the decree. It presents a mixed question of law and fact. The merger of those questions into a recital was in itself a violation of Rule 52 FRCP. Good faith depends on conduct. Conduct is a question of fact, to be determined as any other fact—by evidence. It should be included in findings. Those findings will show *what happened.* The law will then determine whether such conduct was good or bad,—fair, or unfair.

The District Court could not avoid its responsibility by combining law and fact into a general recital.

The violation of Rule 52 FRCP is flagrant. The refusal to follow decisions of this Court, is obvious. For a violation thereof, a writ should issue.

STANDARDS GOVERNING PROCEEDING UNDER RULE 23(c) FRCP.

This point is not argued. Counsel suggest that we have denied the power of compromise with Court approval. Not so. We admit the existence of that power. *We insist upon its exercise according to proper standards.*

It is clear that the decision in *Cohen v. Young,* 127 Fed. (2d) 721, should have governed the proceedings in the District Court; and that the decisions of this Court in Chandler Act cases should have been applied.

The Circuit Court ignored that argument. It is necessary to obtain a ruling on certiorari.

DERIVATIVE STATUS.

The derivative facts are conclusive. We are entitled to manage and control the litigation under the decisions of this Court in the *Delaware & Hudson,* and *Harrington* cases.[3]

We claim derivative status, subject to the power of compromise, in a proceeding conducted according to proper standards in line with the rule in Chandler Act cases.

This point is not argued by counsel. It was ignored by the Circuit Court. It is necessary to obtain a ruling on certiorari.

CALIFORNIA LAW ON DERIVATIVE STATUS.

There is no essential difference between the local law and the federal law. California recognizes a property right sufficient to support an action. It accords stockholders the right to sue where the corporation is involved in collusion or is hostile to the minority.[4]

Counsel rely on dictum in *Whitten v. Dabney,* 171 Cal. 621. It is there suggested that a plaintiff shareholder is merely a guardian *ad litem.* Counsel then argue that such stockholder may be supplanted whenever the corporation appears on its own behalf. Local decisions do not recog-

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[3]*Delaware & Hudson Co. v. Albany & Susquehanna R.R. Co.,* 213 U.S. 435; *Doctor v. Harrington,* 196 U.S. 579.

[4]Cases cited in petition p. 17, and in brief at pages 65-68.

nize that principle. It is uniformly held that a corporation, *acting in good faith,* may compromise with Court approval.

We have claimed the right to litigate the good faith of this corporation, as a question of fact. We have demanded a trial of that issue. We have appealed from a judgment which indulges a presumption of good faith without trial.

Actually, the bank seeks realignment. It was joined as a party defendant. It can become a plaintiff, only by compliance with federal rules. These rules require a trial of that issue.

CROSS-EXAMINATION AND DISCOVERY.

In the constitutional sense this suit was *pending.* An arbitrary "dismissal" filed without notice, did not terminate the proceeding. Our demands for cross-examination were an essential part of our demand for a trial. Demands for testimony by deposition, stand on the same basis.

Materiality of the proof was clear. It was proper to inquire into the conduct of the majority shareholder. (*Pepper v. Litton,* 308 U.S. 295.) The settlement could not be approved without determining that it would be "fair and equitable". (*Case v. Los Angeles Lumber Products* Co., 308 U.S. 106 at 114.)

AMENDMENT AND INTERVENTION.

Mrs. Doble could intervene, as of right, when the District Court denied Mr. Denicke the right to continue as representative of all stockholders. Her prior application for intervention involved a discretion. The ruling thereon was not appealable.

An amended pleading was lodged with the clerk. This set up the facts, as developed by discovery. We were entitled to file it in aid of our right to a trial.

CONFLICT WITH SIXTH CIRCUIT.

We submit the following comparison with *Cohen v. Young,* 127 Fed. (2d) 721.

Scope of Proceeding under Rule 23(c).

> "The rule provides for notice to stockholders not only in order that they may have the right to be heard, but also in order that the court may have the benefit of that broader information which comes from receiving advice as to the views of all parties concerned and from considering evidence . . . upon the relevant points of the case. . . . The rule was adopted to secure not routine approval of a consent decree, but in order to insure supervision of the court for the protection of the corporation and all the stockholders." (127 Fed. (2d) at 725.)

In our case, the District Court presumed good faith without trial. It refused to admit proof bearing on the conduct of the parties who handled the negotiation.

Documentary Proof Incorporated in the Record.

> "The documents relied upon by the attorneys should have been incorporated in the record. The appellant had a right to invoke the discretion of the court to decide whether the compromise recommended did in fact protect the interest of the corporation and of the stockholders." (127 Fed. (2d) 725.)

Depositions were on file. We sought to read them into the record. We tried to introduce an auditor's report. There was an arbitrary refusal to admit proof.

Duty to Investigate.

> "It was the duty of the court to consider the available evidence in this light . . ." (Whether compromise protected interests of corporation and stockholders.) ". . . its refusal or failure to consider it . . . deprived the appellant of a substantial right." (127 Fed. (2d) 725.)

Fair and Equitable.

> ". . . the derivative nature of the claims requires that the compromise approved be adequate and fair to all concerned." (127 Fed. (2d) 725.)

The District Court did not determine the amount of the liability. It failed to get at any of the facts required for the exercise of independent judgment.

Findings.

> "The exercise of discretion does not permit the Court to disregard the substantive principles of law established for the protection of litigants. One of these principles is that judgments and decrees which make findings of fact shall be founded on evidence. . . . The Court was bound to hear the legal testimony

concerning the compromise. Otherwise it could not safely decide the question of its propriety." (127 Fed. (2d) 726.)

There were no findings. Nothing but a general recital in the decree. No determination of issues raised by objections.

"Where the decision of the Circuit Court of Appeals, sought to be reviewed by certiorari, directly conflicts upon a question of federal law with the decision of another Circuit Court of Appeals upon the same question, the Supreme Court grants certiorari as of course, and irrespective of the importance of the question of law involved. The importance in such cases lies in the preservation of uniformity of decisions in the federal courts upon points solvable by federal law—a basic purpose of the certiorari jurisdiction since its inception in 1891."[5]

This conflict is concerned with Federal Law, viz.: the application of Rule 23(c) FRCP to compulsory settlement of a stockholder's suit.

The decision in the Sixth Circuit cannot be reconciled with what happened in the case at bar.

This condition requires issuance of a writ.

The appendix to this brief contains a reply to the "Statement of Facts" attached to the brief of respondent bank.

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[5]Jurisdiction of the Supreme Court—Robertson & Kirkham, Section 292 at page 563.

GROUNDS SUSTAINING ISSUANCE OF DISCRETIONARY WRIT.

Where a Circuit Court performs its duty under Section 128 of the Judicial Code, a review in this Court is limited to the grounds specified in Rule 38. The following questions require issuance of a writ under that rule:

1. Standards governing opinion writing in Circuit Court.

2. Duty to grant rehearing in bank because of failure to determine specified questions submitted in support of appeal.

3. Conflict with Sixth Circuit.

4. Standards governing action of District Court under Rule 23(c) FRCP.

5. Application of Chandler Act cases.

6. Duty of District Court to nonsuit the petition in view of decisions in *Delaware & Hudson Co. v. Albany & Susquehanna R.R. Co.*, 213 U.S. 435, and in *Doctor v. Harrington*, 196 U.S. 579.

7. Application of decision in *Pepper v. Litton*, 308 U.S. 295, 306.

8. Right to litigate good faith of bank management under the principles expressed therein.

9. Right to cross-examine the bank officers who handled the settlement negotiations.

10. Right to take depositions of RFC officials to develop facts involving merits of the compromise.

11. Right to take depositions of other federal officials, bearing on the same matter.

12. Right to a *subpoena duces tecum*, directed to the Chief National Bank Examiner.

CERTIORARI AS OF RIGHT—DIRECT APPEAL.

This case involves more than a discretionary review. The Circuit Court has failed to discharge its responsibility. No valid judgment was entered in that Court. The opinion filed during adjournment fails to dispose of the questions presented. There has been a failure in the administration of justice.

Under these conditions, review in this Court becomes a matter of right. A certiorari petition then becomes, for practical purposes, a petition for appeal. The denial of due process in a Circuit Court imposes a special obligation on this Court. A denial of certiorari in such a case would violate the Constitution of the United States. We cite the following authority in support of that contention:

(1) Judicial Code Section 128 (28 USCA 225) provides:

> "The Circuit Courts of Appeals *shall have appellate jurisdiction* . . . in all cases save where a direct review may he had in the Supreme Court . . ."

(2) *Cohens v. Virginia,* 19 U.S. 264, at 403, holds that the duty to exercise this jurisdiction, is *absolute.*

(3) The Fifth Amendment requires a Circuit Court to afford due process—*to exhaust its jurisdiction when a case is properly laid before it.*

(4) Judicial Code, Section 240 (28 USCA 347), confers on this Court the *power* "in any case" to require that a matter be certified here for review. *That section contemplates* that this Court act as guardian of the constitutional rights of litigants in the Circuit Courts,—*that it enforce their rights where due process is denied.*

(5) Due process under the Fifth Amendment requires the exercise of that power—where due process is denied in a lower federal court.

(6) This Court has *supreme power* over "inferior courts (which) the Congress may from time to time ordain and establish". (Const. Art. III, Sec. 1.)

(7) Responsibility is equal to power—a duty and not a discretion governs its exercise.

(8) The constitution is the "supreme law of the land". (Art. VI.)

GROUNDS FOR REVIEW, AS OF RIGHT.

(1) To vacate the void entries made in the Circuit Court.

(2) To protect our right to a decision, by an appellate court, on the questions not determined in the Circuit Court.

(3) To grant relief from the arbitrary and unjudicial conduct of the Circuit Court which resulted in a denial of due process in that Court.

(4) To vacate the judgment entered without trial in the District Court.

(5) To enforce petitioners' right to a decision in accordance with precedent.

APPLICATION FOR ORAL ARGUMENT.

These questions are unusual. Their importance is tremendous.

In *Boynton v. Hutchinson Gas Co.*, 291 U.S. 656, a novel and important question was presented. This Court ordered oral argument on the question whether certiorari should be granted, and thereafter made an order for issuance of a writ.[6]

We submit that the public importance of these questions justifies the making of such an order in the case at bar.

Dated, San Francisco, California,
September 19, 1944.

Respectfully submitted,
AARON M. SARGENT,
Attorney for Petitioners.

(Appendix Follows.)

[6]Jurisdiction of the Supreme Court of the United States—Robertson & Kirkham, p. 543; Supreme Court Journal, Jan. 22, 1934, p. 137. See also *Florida v. Mellon*, 273 U. S. 12.